IN THE

SUPREME COURT OF THE UNITED STATES

No. 71-5313

DONALD L. BROOKS,
Petitioner,

v.

STATE OF TENNESSEE,
Respondent.

On Writ of Certiorari to the Court of Criminal Appeals of Tennessee

BRIEF FOR THE RESPONDENT

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OPINION BELOW

A correct copy of the May 5, 1971, opinion and judgments of the Court of Criminal Appeals of Tennessee, affirming the conviction of the Petitioner in the First Division of the Circuit Court of Hamilton County, Tennessee, of the offenses of armed robbery and unlawfully carrying a pistol, is included in the appendix. (Appx. 6-22). A correct copy of the August 16, 1971, order of the Supreme Court of Tennessee denying Petitioner's petition for writ of certiorari is also included in the appendix. (Appx. 24).

JURISDICTION

The jurisdictional requisites are adequately set forth in the brief of the Petitioner. (Pet.Br. 1-2).[1]

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED[2]

U.S. Const., amend. V.

> "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment by a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in the time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

U.S. Const., amend. XIV.

> "Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce

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[1] References to Petitioner's brief are to pages as numbered in the carbon copy of his brief served upon Respondent December 30, 1971. As of the date the manuscript of Respondent's brief went to the printer, January 27, 1972, Respondent had not received a copy of Petitioner's printed brief.

[2] The brief of the Petitioner (Pet. Br. 2-3) incorrectly states that Amendment VI to the Constitution of the United States is involved. However, this Court's November 16, 1971, order granting the petition for writ of certiorari (Appx. 28) specifically limits the grant to petition Questions III and IV, which involve U. S. constitutional provisions only with regard to Amendments V and XIV.

any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Tenn. Const., art. I, sec. 9.[3]

"That in all criminal prosecutions, the accused hath the right to be heard by himself and his counsel; to demand the nature and cause of the accusation against him, and to have a copy thereof, to meet the witnesses face to face, to have compulsory process for obtaining witnesses in his favor, and in prosecutions by indictment or presentment, a speedy public trial; by an impartial jury of the County in which the crime shall have been committed, and shall not be compelled to give evidence against himself."

Tenn. Code Ann. [T.C.A.], sec. 40-2403.

"The failure of the party defendant to make such request and to testify in his own behalf, shall not create any presumption against him. But the defend-

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[3] Tennessee Constitution, Article I, Section 9, was relied upon by the Petitioner before the Court of Criminal Appeals of Tennessee, but that Court overruled his assignment of error which contended that the refusal of the trial court because of T.C.A. § 40-2403 to allow him to be placed on the witness stand after other witnesses had testified in his behalf violated Tennessee Constitution, Article I, Section 9. The same assignment of error with regard to the same Tennessee constitutional provision was made to the Supreme Court of Tennessee in a petition for writ of certiorari, but that Court held that the petition was not well taken and denied it. Although this Court's order (Appx. 28) granting the petition for writ of certiorari grants it as to Question III of the petition, which contends in part that T.C.A. § 40-2403 violates Tennessee Constitution, Article I, Section 9, Respondent contends, for reasons stated *infra* 26-27 that this Court should not be concerned with whether the State statute in question violates the State constitutional provision invoked by Petitioner, that being a matter for the State courts whereas this Court's jurisdiction is as to Federal questions.

ant desiring to testify shall do so before any other testimony for the defense is heard by the court trying the case."

QUESTIONS PRESENTED

The questions presented, as stated in the Court's November 16, 1971, order granting the petition for writ of certiorari (Appx. 28), are as follows:

"III. The trial court was in error in refusing to allow defendant to be placed on the witness stand after other witnesses had testified in his behalf as said Tennessee Statute requiring defendant to be first witness is unconstitutional in violation of the Fifth Amendment and Fourteenth Amendment of the Federal Constitution and Article I, Section 9 of Tennessee Constitution."

"IV. Code section 40-2403 deprives a defendant of due process of law, in violation of the Fourteenth Amendment to the United States Constitution."

STATEMENT OF THE CASE

The Petitioner, Donald L. Brooks, was tried on April 1, 1970, in the First Division of the Circuit Court of Hamilton County, Tennessee, on two charges. In number 118061, the jury found the Petitioner guilty of armed robbery and fixed punishment at ten (10) years in the State Penitentiary. In number 118079, the jury found the Petitioner guilty of unlawfully carrying a pistol and fixed punishment at a fine of Fifty Dollars ($50.00) and a term of eleven months and twenty-nine days in the county workhouse. Thereupon the trial judge pronounced judgment.

In the course of the trial, after the State had completed its case, counsel for Petitioner moved the court for permission to reserve the right to have the Petitioner testify following certain other witnesses for the defense. The trial court denied the motion on the grouund that T.C.A.

§ 40-2403 requires that if a defendant testifies he must do so before any other testimony for the defense is heard. (Appx. 1-3).

After conviction, a motion for a new trial was filed and was overruled by the trial court. One of the grounds for the motion (ground 6) was that the court had erred in refusing to allow the Petitioner to be placed on the witness stand after other witnesses had testified in his behalf, it being contended that the statute in question is "unconstitutional", although no particular constitutional provision was invoked. (Appx. 4-5).

Petitioner appealed his convictions to the Court of Criminal Appeals of Tennessee, assigning as error inter alia that the trial court had erred in refusing to allow him to be placed on the witness stand after other witnesses had testified in his behalf, and contending that T.C.A., § 40-2403 violates the Fifth and Fourteenth Amendments of the United States Constitution and Article I, Section 9, of the Tennessee Constitution. That court on May 5, 1971, overruled the assignments of error and affirmed Petitioner's convictions. (Appx. 6-22).

Petitioner then petitioned the Supreme Court of Tennessee for writ of certiorari, again contending that T.C.A., § 40-2403 violates the Fifth and Fourteenth Amendments to the Constitution of the United States and Article I, Section 9, of the Tennessee Constitution. The Supreme Court of Tennessee on August 16, 1971, denied the petition for writ of certiorari. (Appx. 24).

Finally, Petitioner petitioned this Court for writ of certiorari, and this Court on November 16, 1971, granted the petition but limited the grant to the two questions stated *supra* 4 under "Questions Presented," challenging the constitutionality of T.C.A., § 40-2403 under the Fifth and Fourteenth Amendments of the United States Constitution and Article I, Section 9, of the Tennessee Constitution. (Appx. 28).

ARGUMENT

I

T.C.A., § 40-2403 Is a Truth-in-Testimony Law—a Rational, Logical, and Legitimate Complement of the Sequestration of Witness Rule—Which the State Under Our Federal System Had the Right to Adopt and Apply as a Part of Its Trial Procedures for the Administration of Its Criminal Laws.

At the threshold, it is desirable to look at the background and context in Anglo-American jurisprudence of the rule that a defendant if he chooses to testify must testify before other testimony in his behalf is heard. (For brevity this rule will be referred to as the rule requiring the defendant to testify first.)

The rule requiring the defendant to testify first is closely related to the process of placing prospective witnesses out of the hearing of a testifying witness. The latter process, known as sequestration of witnesses and in many states simply as "the rule," is remarked upon by Professor Wigmore as to its "age and universality." 6 Wigmore, Evidence (3d ed. 1940), § 1837. The probative purpose and operation of the sequestration process is said to consist in preventing one prospective witness from "being taught" by hearing another's testimony (*Id.*, § 1838) or from "being influenced" thereby (4 Jones, Evidence [5th ed. Gard 1958] § 889), preventing "collusion" among witnesses (2 Underhill, Criminal Evidence [5th ed. Herrick 1956] § 510), and detecting "falsehood" and preventing a witness from "coloring" testimony because of having heard others (3 Wharton, Criminal Evidence [12th ed. Anderson 1955] § 840).

Obviously, for the sequestration rule to serve its purposes completely, it would be necessary to subject to it all

witnesses, including the parties, in a case; and this has been the practice in some courts. 6 Wigmore, *supra*, § 1841. Professor Wigmore suggests that the party should be exempted from the order of exclusion but be required to take the stand first of the witnesses on his side because, although he has the right to be present during the trial, "yet he has also the duty to do all that is feasible towards preventing suspicion and subserving the opponent's right to sequestration." *Ibid.* The latter approach has found favor in civil cases in at least Georgia, Kentucky, Mississippi, and New Jersey, and in some lower Federal courts. **Tift v. Jones**, 52 Ga. 538, 542 (1874); **Davis v. Atlanta Coca Cola Bottling Co.**, 119 Ga. App. 422, 167 S.E.2d 231, 232 (1969); **Davis v. Kimberlain**, 188 Ky. 147, 221 S.W. 226 (1920); **Commercial Credit Equipment Corp. v. Kilgore**, 221 So.2d 363, 367 (Miss. 1969); **Smillie v. Lerner**, 10 N.J. Misc. 484, 159 Atl. 808 (1932) ("This would seem to be wholesome. The advantage of the exclusion of witnesses is thereby obtained, and the disadvantage of the exclusion of a party in interest does not occur, since there can be no reason for the exclusion of the defendant after he has given his testimony."); **Garabrandt v. Boston Molasses Co.**, 10 P.R.Fed. 71 (1917) (Rule of Court 51); **Coombs v. Coombs**, 59 D.C.App. 30, 32 F.2d 421 (1929). See also, Ontario Rules of P. & P., Civ. 1947, No. 254; and rules of court in other Anglican jurisdictions cited in footnotes to 6 Wigmore, *supra*, § 1869.

The rule that the defendant in a criminal case must testify first has for similar reasons developed in a number of Anglo-American jurisdictions, sometimes by court rule or decision, sometimes by statute. Professor Wigmore states that "The reason for this rule is the occasional readiness of the interested person to adapt his testimony, when offered later, to victory rather than to veracity, so as to meet the necessities as laid open by prior witnesses." 6 Wigmore, *supra*, § 1869.

The requirement that the defendant in a criminal case who chooses to testify must do so prior to testimony of other witnesses in his behalf has been approved in two of the United States Courts of Appeal. The Court of Appeals for the Sixth Circuit did so in **United States v. Shipp**, 359 F.2d 185, 189-190 (6th Cir. 1966), cert. den. 385 U.S. 903 (1966). The Court of Appeals for the Ninth Circuit likewise approved the rule in affirming a conviction in **Spaulding v. United States**, 279 F.2d 65, 66-67 (9th Cir. 1960), cert. den. 364 U.S. 887 (1960), wherein the Court said:

> "Appellant contends that the trial court erred in ruling that if appellant would testify in his own behalf, he would have to precede all other defense witnesses to the stand since he had invoked the procedure by which witnesses are excluded from the courtroom. The trial court's ruling seems to be a sensible approach to the problem of what to do with a party who is also a witness when the exclusion of witnesses is called for in order to prevent fabrication of testimony. See 6 Wigmore, Evidence, §§ 1841, 1869 (3d ed. 1940). In any event, appellant has failed to show how he suffered prejudice by the ruling. He didn't take the stand, and we doubt that there was any causal connection between the ruling here complained of and the refusal to testify. Indeed, the only connection we can think of would be that appellant was rendered incapable to tailoring his own testimony to fit in with what previously was said by other witnesses. In the absence of prejudice, we have, if anything, a case of harmless error."

Two American states, Kentucky and Tennessee, have adopted statutes requiring the defendant in a criminal case to testify first among his witnesses. The Kentucky statute (Ky.Rev.Stat. 421.225 [1962]) goes back to 1893 (**Robinson v. Commonwealth**, 459 S.W.2d 147, 148 [Ky.

1970]; **Anderson v. Commonwealth**, 353 S.W.2d 381, 387 [Ky. 1962]) and reads as follows:

> "(1) In any criminal or penal prosecution the defendant, on his own request, shall be allowed to testify in his own behalf, but his failure to do so shall not be commented upon or create any presumption against him.
>
> (2) A defendant so requesting to be allowed to testify for himself shall not be allowed to testify in chief after any other witness has testified for the defense."

The Tennessee statute, T.C.A., § 40-2403, enacted as Chapter 79 of the Acts of Tennessee of 1887, is set out hereinabove *supra* 3. The requirement that the defendant in a criminal case testify first was early construed by the State Supreme Court in **Morgan v. State**, 86 Tenn. 472, 7 S.W. 456 (1888), to be mandatory and in **Clemons v. State**, 92 Tenn. 282, 21 S.W. 525 (1893), to be imperative. However, the Court later held that the parties could waive the requirement. **Martin v. State**, 157 Tenn. 383, 8 S.W.2d 479 (1928). And the Court held in **Arnold v. State**, 139 Tenn. 674, 676, 202 S.W. 935 (1917), that "We think it was not intended by the legislature that a defendant in a criminal case should be permitted to testify in his own behalf and not be permitted to rebut testimony against him which was offered by the State after he had taken and left the witness stand." In view of these later relaxations of the Court's early strict attitude toward the statute, and in view of its holding in **Hughes v. State**, 126 Tenn. 40, 90, 148 S.W. 543 (1912), that witnesses giving evidence in rebuttal do not go under the sequestration rule, it seems reasonable to expect that the Court would allow a defendant in a criminal case to testify on rebuttal even though he had not earlier testified in chief. Recently the Tennessee Supreme Court affirmed a holding that T.C.A.,

§ 40-2403 does not violate the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution, refusing to hold that the statute violated the rights of the defendant in that case to fair trial, due process, and equal protection of the law. **Harvey v. State**, 468 S.W.2d 731 (Tenn. 1971).

A number of Anglican jurisdictions have by judicial decision or rule of court followed the practice of requiring the testifying defendant in a criminal to testify first. Thus, in Alberta, Canada, the Court in **Rex v. Christenson**, 2 Dom.L. Rep. 379, 386 (1923), stated:

> "In a criminal case, where it is intended that the accused is to be called as a witness on his own behalf, he ought—not necessarily, but generally as a matter of expediency—to be called as the first witness for the defense, because, otherwise, it is open to observation to the jury that the accused has coloured or adapted his evidence to fit in with the evidence of the witnesses who have preceded him, he necessarily being present and hearing their evidence."

In Australia, in **Rex v. Richards, McDonald, and Aunger** (1918), S.A.L.R. 315, the Court stated that "It is desirable that he [the defendant] be the first witness called where witnesses are ordered out of court."

Some years ago in England, L.C.J. Alverstone stated in **Rex v. Morrison**, 6 Cr.App.Rep. 159, 165, 75 J.P. 272 (1911): "In all cases I consider it most important for the prisoner to be called before any of his witnesses. He ought to give his evidence before he has heard the evidence and cross-examination of any witness he is going to call." In 1968, the Court of Appeal, Criminal Division (Davies, L.J., Roskill and Cusack, JJ.), converted Lord Alverstone's dictum in Morrison's case into a rule of law. **Regina v. Smith**, 52 Cr.App.Rep. 224, C.A., 132 J.P. 312, 1 W.L.R.

636, 112 Sol.Jo. 231, [1968] 2 All. E.R. 115. In the **Smith** case the defendant in appealing her conviction alleged as error the requirement of the trial tribunal that she give evidence first before calling any of her three defense witnesses. Cusack, J., delivered the judgment of the Court of Appeals, stating in part as follows:

> "The general rule and practice in criminal cases is that witnesses as to fact on each side should remain out of court until they are required to give their evidence. The reason for this is obvious. It is that if they are permitted to hear the evidence of other witnesses they may be tempted to trim their own evidence. It is certainly the general practice in the experience of all the members of this court that where an accused person is to give evidence he gives evidence before other witnesses who may be called on his behalf. There are, of course, rare exceptions, such as when a formal witness, or a witness about whom there is no controversy, is interposed before the accused person with the consent of the court in the special circumstances then prevailing. In the view of this court the general practice to which I have referred is the correct practice which ought to be observed."
>
> [The Court then quoted the same statements from **Rex v. Morrison** as are quoted hereinabove.]
>
> "That observation was interposed in the course of argument and was obiter, but it is an authoritative statement which this court reiterates and endorses as correctly stating the law."
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> * * * * * * *
>
> "As this is a question which is still raised from time to time in the course of criminal proceedings, with which alone the court is dealing, it is hoped that the statement which I have read from LORD ALVER-

STONE, which is now endorsed by this court, will settle the matter and be accepted as setting out the correct procedure which ought to be followed in future cases."

A law review comment on the **Smith** decision, Moore, "Order of Witnesses in a Criminal Case," 26 Cambridge L.J. 185, 185-186 (1968), observes as to this proposition "now . . . elevated to the status of a rule of law":

> "It is, of course, usually very desirable that a prisoner should give evidence before his supporting witnesses are called. In a criminal case witnesses, other than the prisoner, are not allowed into court until they are due to give their evidence. Their testimony is given, therefore, in at least comparative ignorance of what others have said, and the opportunities for them to trim their testimony to accord with that of others is accordingly reduced. But the prisoner is present throughout and, if his witnesses give evidence before he does, he is afforded ample opportunity to trim his own evidence."

Petitioner's brief (Pet.Br. 11) quotes from **Nelson v. State**, 32 Tenn. 237, 257 (1852), the statement that "the experience of wise men in all ages" has been that the sequestration of witnesses rule is "invaluable, in many cases, for the ascertainment of truth and the detection of falsehood." In a continuing quest for truth and justice in the trial of cases, Tennessee continues to use the sequestration rule "to detect falsehood as well as to prevent any witness from coloring his, or her, testimony either purposely or through influence by talking to other witnesses and hearing them talk." **Nance v. State**, 210 Tenn. 328, 333, 358 S.W.2d 327 (1962). T.C.A. § 40-2403 in requiring the testifying defendant to take the stand before his other witnesses is a Truth-in-Testimony Law—a rational, logical, and legitimate complement of the sequestration of wit-

nesses rule, making the latter rule more effective in truth-seeking. Petitioner's brief recognizes this by conceding that "The fact that a party may not be placed under 'the rule' was probably one of the chief reasons for the requirement that a defendant testifying in his own behalf present himself for examination before other defense witnesses testify" (Pet.Br. 12), that "Requiring the defendant to testify first, if he testifies at all, ensures that he will not be tempted to alter his own testimony after hearing other evidence presented in his behalf" (Pet.Br. 12), that "the occasional readiness of the interested person to adapt his testimony, when offered later, to victory rather than veracity, so as to meet the necessities as laid open by prior witnesses" is a "rational basis" for the T.C.A. § 40-2403 requirement (Pet.Br. 10), and that "The purpose of this Code section . . . to insure that a defendant not be tempted to color his version of the circumstances by hearing witnesses in his favor prior to his own testimony" is "perhaps . . . legitimate" (Pet.Br. 26).

To complete the ring, the Tennessee judiciary imposes as a condition to the testifying prosecutor remaining in the court room after the sequestration rule is in effect that he be the first witness examined for the State. Thus it was laid down in **Smartt v. State**, 112 Tenn. 539, 551, 80 S.W. 586 (1903):

> "The attorney for the State has the right to such assistance as the prosecutor can give him in the management of the State's case, and, upon his request, it is not error to permit the prosecutor to remain in the courtroom after the [sequestration] rule has been called for; but the court should impose as a condition that the State, if it desires to use the prosecutor as a witness, should examine him first."

The mandatory nature of this requirement is indicated by its restatement in the treatise regarded by generations

of Tennessee lawyers as the "Bible" of Tennessee practice and procedure, Caruthers, History of a Lawsuit (8th ed. Gilreath & Aderhold 1963) § 330:

> "In criminal cases the prosecutor is excepted from the [sequestration] rule, but the state must examine him as the first witness."

Therefore, it is "tit for tat." Whatever "burden" the defendant bears by having to testify first if at all for the defense, the State likewise bears in having to put the prosecutor on first if he is to remain in the courtroom under the sequestration rule. With this added factor in mind, not mentioned in Petitioner's brief, the rule of T.C.A. § 40-2403 conceded by him to have a "rational" basis and to be "perhaps . . . legitimate" of purpose is seen to be all the more rational and legitimate.

It should be clear from the authorities cited hereinabove that Tennessee has not at all done a unique thing in adopting the requirement that the testifying defendant testify first among his witnesses. However, even if Tennessee had done a unique thing in this regard, this should not argue against the validity of adopted requirement. "That the 'near-uniform judgment of the Nation' is otherwise than the judgment in some of its parts affords no basis for me to read into the Constitution something not found there." Chief Justice Burger, dissenting in **Baldwin v. New York**, 399 U.S. 66, 77 (1970).

Moreover, Tennessee as any other state in our federal system should be able to serve as a laboratory for experimentation in government, including the operation of the judiciary. It is, Mr. Justice Brandeis said, "one of the happy incidents of the federal system that a single courageous state may, if its citizens choose, serve as a laboratory . . ." **New State Ice Co. v. Liebmann**, 285 U.S. 262, 280, 311 (1932) (dissenting opinion). This attitude was

again expressed by this Court recently through Justice Blackmun in **McKeiver v. Pennsylvania**, 403 U.S. 528, 91 S.Ct. 1976, 1987 (1971), where it was said, "We are reluctant to disallow the States further to experiment and to seek in new and different ways the elusive answers to the problems of the young, and we feel that we would be impeding that experimentation by imposing the jury trial."

In a federal system such as ours, the states should be allowed some diversity in the procedures they adopt to operate their courts and trials in the administration of justice. This is not a situation in which procedures may suitably be duplicated in every state as if they were cookies produced by the same cookie cutter. It was in this spirit that the Court said not long ago that "Tolerance for a spectrum of state procedures dealing with a common problem of law enforcement is especially appropriate here." **Spencer v. State of Texas**, 385 U.S. 554, 566 (1967).

In **Spencer**, the Court expressed its attitude of moving with "caution before striking down state procedures" and further stated:

> "Cases in this Court have long proceeded on the premise that the Due Process Clause guarantees the fundamental elements of fairness in a criminal trial [citation of cases]. But it has never been thought that such cases establish this Court as a rule-making organ for the promulgation of state rules of criminal procedure. And none of the specific provisions of the Constitution ordains this Court with such authority."

Spencer v. State, 385 U.S. 554, 563-564, 565 (1967).

II.

Petitioner Has Failed to Sustain His Contention That the Trial Court Applied T.C.A. § 40-2403 So as to Violate His Fifth Amendment Right to Remain Silent.

Petitioner's reliance upon the Fifth Amendment presumably rests upon that amendment's prohibition that "No person . . . . shall be compelled in any criminal case to be a witness against himself," although he phrases it as a "right to remain silent under the Fifth Amendment." (Pet.Br. 24).

Counsel for Petitioner candidly concedes, as any honest person must, with regard to T.C.A. § 40-2403, "Nor does it deny a defendant the bare right to remain silent." (Pet. Br. 24). The argument seems to be that requiring the Petitioner to choose at the beginning of his proof whether to exercise his right to remain silent is imposed "at a time when he does not yet know of the effectiveness and scope of his defense" and, therefore, serves to "chill" the exercise of this right, because he cannot make an intelligent waiver of this right before he has seen his defense "unfold before the trial court and jury." (Pet.Br. 24). This contention is repeated in other words by saying that T.C.A. § 40-2403 "cuts down on the privilege" of remaining silent by "forcing the defendant to elect whether to exercise or waive the privilege at a time when the desirability for waiving it is unknown." (Pet.Br. 25).

The answer to this argument is that the Petitioner and counsel should have made preparation for trial so as to know at the beginning of the Petitioner's proof the effectiveness and scope of his defense and the desirability for waiving the right to remain silent by taking the stand in his own behalf. The only thing "chilled" is the opportunity otherwise to "trim" or to "color" or to falsify testimony so as to conform with that which other wit-

nesses have given after they were put under oath and subjected to cross-examination. The State submits that there is nothing unconstitutional about a rule which does not deny the defendant the right to remain silent but simply requires him to testify first among his witnesses if he is to testify at all so as to promote truthfulness in his testimony in the same way that truth is promoted as to all other witnesses by the sequestration of witnesses rule. Incidentally, the Petitioner admits that the "perhaps . . . legitimate" purpose of T.C.A. § 40-2403 "to insure that a defendant not be tempted to color his version of the circumstances by hearing witnesses in his favor prior to his own testimony" is such that it "cannot be more narrowly achieved." (Pet.Br. 26).

The Petitioner, elaborating upon his contention that T.C.A., § 40-2403 "chills" his exercise of his right to remain silent, adds that (1) the defendant will be subjected to the hazards of cross-examination, including attacks upon his character, if he chooses to testify, (2) the defendant may not intelligently weigh the advantages and disadvantages of testifying until he first knows whether testifying would help his cause, and (3) the choice of whether to testify is a choice which must be left to the unfettered freedom of the defendant. (Pet.Br. 29-30). As to the first of these points, it is undeniable that if the defendant chooses to testify he will be subjected to the hazards of cross-examination, including questions relating to his character. However, he would be subjected to those hazards at whatever stage of the trial he might testify. It should be noted that "It was stipulated the defendant had no prior convictions." (Appx. 9). By choosing at the beginning of his proof not to testify, the Petitioner in this case, therefore, was not avoiding a hazard that his character would be impeached by a cross-examination concerning possible prior convictions. As to the second point (that the defendant may not intelligently weigh the advan-

tages and disadvantages of testifying until he first knows whether testifying would help his cause), the Respondent rests upon its argument made hereinabove (*supra* 17) that adequate preparation for trial will result in knowledge as to whether the testimony of the defendant would help his cause. Concerning the third point (that the choice of whether to testify is a choice which must be left to the "unfettered freedom" of the defendant), the defendant has "unfettered freedom" to make that choice under the T.C.A., § 40-2403 requirement unless one means by "unfettered freedom" that the choice be free from any difficulty. There is no way of getting around the fact that the decision by a defendant to testify or not to testify may be a difficult decision for him to make whatever the stage of the trial may be at which he makes the decision. Here the Court's recent decision in **McGautha v. California**, 402 U.S. 183, 91 S.Ct. 1454, 1470 (1971), is in point. In that case the Court held that the policies of the privilege against compelled self-incrimination are not offended when a defendant in a capital case yields to the pressure to testify on the issue of punishment at the risk of damaging his case on guilt. In doing so, the Court said:

> "The criminal process, like the rest of the legal system, is replete with situations requiring 'the making of difficult judgments' as to which course to follow. **McMann v. Richardson**, 397 U.S. 759, 769 (1970). Although a defendant may have a right, even of constitutional dimensions, to follow whatever course he chooses, the Constitution does not by that token always forbid requiring him to choose."

In **McGautha**, the Court pointed to a number of situations in which the defendant is faced with a difficult choice, none of which had been held to violate the privilege against compelled self-incrimination. These include the choice to testify in the defendant's own behalf although it may

open the door to otherwise inadmissible evidence which is damaging to his case; taking the stand in his own behalf although he may then be cross-examined on matters reasonably related to the subject matter of his direct examination; taking the stand in his own behalf although he may then be impeached by proof of prior convictions or the like; after a motion for acquittal at the close of the government's case is denied, deciding whether to stand on the motion or to put on a defense with the risk that in doing so he will bolster the government's case enough for it to support a verdict of guilty; and in Florida, under a "notice-of-alibi" rule, choosing whether to abandon his alibi defense or to give the State both an opportunity to prepare a rebuttal and leads from which to start. 91 S.Ct. 1454 at 1470-1472. The Court concluded in **McGautha**, "[I]t is not thought inconsistent with the enlightened administration of criminal justice to require the defendant to weigh such pros and cons in deciding whether to testify," 91 S.Ct. 1454 at 1471, and "[T]he Federal Constitution, which marks the limits of our authority in these cases, does not guarantee trial procedures that are the best of all worlds, or that accord with the most enlightened ideas of students of the infant science of criminology, or even those that measure up to the individual predilections of members of this Court." 91 S.Ct. 1454 at 1474. The Respondent in the case at bar contends that likewise it is not inconsistent with the enlightened administration of criminal justice to require the defendant to weigh such pros and cons in deciding whether to testify at the beginning of his proof, especially in view of the high public interest in truthful testimony which is served by the statute in question.

III

Petitioner Has Failed to Sustain His Contention That the Trial Court Applied T.C.A. § 40-2403 So as to Violate His Due Process Rights Under the Fourteenth Amendment.

The contention is made by Petitioner that the requirement of T.C.A. § 40-2403 places a substantial burden on the defendant in that it "forces him to exercise his option to testify before he has the opportunity to observe the strength of his defense" and that this is such a burden as to deprive him of due process of law. (Pet.Br. 12-13). The Respondent's reply to this argument is that the defendant should know the strength of his own defense prior to hearing it at the trial, and therefore he is not prejudiced by being required under the statute to make his decision about whether to testify before he has still another opportunity, this time in court, to observe the evidence in his behalf. There are many good reasons why a defendant in a criminal proceeding should be permitted to hear the witnesses who testify against him, but there are no reasons why he must be allowed to hear in court the witnesses he has called in his defense. If he did not know what their testimony would be, it is difficult to understand why he would call them in the first place. He is not, of course, thereby deprived of his right "to be confronted with the witnesses against him," inasmuch as at the point of beginning the proof in his behalf he will already have been confronted with the State's witnesses "against him." This constitutional provision on its face has no application to the witnesses in behalf of a defendant. **State v. Bomer**, 179 Tenn. 67, 78, 162 S.W.2d 515 (1942); **Petty v. State**, 72 Tenn. 326, 328 (1880).

The Petitioner makes the further argument that his due process rights have been violated by the application of T.C.A. § 40-2403 so as allegedly to deny him of effective

assistance of counsel. (Pet.Br. 19-20). For this proposition, Petitioner cites **Ferguson v. Georgia**, 365 U.S. 570 (1961). Petitioner's reliance upon the **Ferguson** case is misplaced, however, inasmuch as that decision held only that the refusal to allow a defendant's statement to be directed by his counsel was a violation of the Due Process Clause. Obviously, that is not the situation here with the application of T.C.A. § 40-2403, because the defendant when he takes the stand in his own behalf at the beginning of his proof is directed in his testimony by the questioning of his own counsel and enjoys the "guiding hand of counsel" referred to in **Powell v. Alabama**, 287 U.S. 45 (1932). In this connection, the Petitioner argues that the decision as to whether to take the stand at the beginning of the proof "requires that the attorney delicately weigh the pros and cons of placing the defendant on the witness stand" before the defendant and his counsel can determine "the propriety of having the defendant take the stand" and this presents "undue obstacles" and shackles the "guiding hand of counsel." (Pet.Br. 33). This brings us back to the teachings of **McGautha v. California**, 402 U.S. 183, 91 S.Ct. 1454 (1971), and **McMann v. Richardson**, 397 U.S. 759, 769 (1970), and cases cited in those decisions to the effect that the criminal process is replete with situations requiring the making of difficult judgments as to which course to follow but the Constitution does not always forbid requiring the defendant to choose. These cases and situations are discussed in Respondent's brief under proposition II, and its reasoning there is adopted here.

The Petitioner makes the charge that the requirement of T.C.A., § 40-2403 that the defendant present himself as the first witness in his own behalf is "unreasonable." (Pet.Br. 23). To the contrary, this requirement is eminently reasonable as has been demonstrated in the discussion under the first proposition of Respondent's brief, which discussion is adopted but not repeated here. Further, when a

due process argument is made on a general "fairness" approach, this Court "has always moved with caution before striking down state procedures." **Spencer v. State,** 385 U.S. 554, 565 (1967). And, as the Court pointed out in the **Spencer** case, the Due Process Clause guarantee of fundamental fairness in a criminal trial does not "establish this Court as a rule-making organ for the promulgation of state rules of criminal procedure. And none of the specific provisions of the Constitution ordains this Court with such authority." 385 U.S. 554 at 563-564. See also, Justice Stewart's concurring opinion in the same case. 385 U.S. 554 at 569. Further, the Respondent contends that the reasonableness and fairness of the requirement of T.C.A., § 40-2403 is all the more evident when it is remembered that Tennessee requires that a prosecutor who wishes to remain in the courtroom when the sequestration of witnesses rule is in effect must give his testimony before any other witnesses for the State are heard. See discussion and authorities under proposition I of this brief. *Supra* 13.

IV

Whether or Not T.C.A., § 40-2403 as Applied by the Trial Court to the Petitioner in This Case Violated the Sixth Amendment Is Not Properly Before This Court: In Any Event There Was No Such Violation.

As noted at the beginning of the Respondent's brief, the order of this Court granting the petition for writ of certiorari in this case expressly limits the grant to Questions III and IV of the petition, which raised questions only with regard to the Fifth and Fourteenth Amendments to the United States Constitution and Article I, Section 9, of the Tennessee Constitution. (Appx. 28). Inasmuch as the Court has not granted certiorari with regard to a Sixth Amendment question, no such question is properly before the Court.

Further, it should be noted that no contention that the trial court violated the Sixth Amendment to the Constitution of the United States in its application of T.C.A. § 40-2403 to the trial of Petitioner's case was ever made in his motion for a new trial to the trial court, nor was it assigned as error in Petitioner's brief to the Court of Criminal Appeals of Tennessee, nor was it assigned as error in Petitioner's petition to the Supreme Court of Tennessee for writ of certiorari. The Petitioner having failed to raise this question at any point before any of the Tennessee courts, the Respondent takes the position that this Court should not now consider this untimely and out-of-order attempt to place the trial court in error. If there had been error with regard to the Sixth Amendment, the same should have been properly brought to the attention of the trial court and in turn to the Tennessee appellate courts. See, *e.g.*, **Hormel v. Helvering**, 312 U.S. 552, 556 (1941). There has been no significant change in the law since the trial and there is no other factor which would justify this Court in now considering this point which was nowhere raised below. **Standard Industries, Inc. v. Tigrett Industries, Inc.**, 397 U.S. 586, 587-588 (1970) (dissenting opinion).

Even if it were concluded that a Sixth Amendment question is before this Court, it is not clear at all from Petitioner's brief what his contention is in this regard. The only clause in the Sixth Amendment which the Respondent can conceive of the Petitioner having reference to is the guarantee that "In all criminal prosecutions, the accused shall enjoy the right . . . .to be confronted with the witnesses against him. . . ." As pointed out previously in this brief (*supra* 20), T.C.A. § 40-2403 in no way denies a defendant his right to be in the courtroom throughout the proceedings and to confront all of the prosecution's witnesses against him. Petitioner's complaint seems to be that he has to decide at the beginning of the proof for the

defense whether he will give testimony in his own behalf and before he hears the witnesses on his side of the case. Obviously, a guarantee that a defendant has the right to be confronted with the witnesses **against** him is no guarantee of a right to confront the witnesses **for** him. See **State v. Bomer**, 179 Tenn. 67, 78, 162 S.W.2d 515 (1942); **Petty v. State**, 72 Tenn. 326, 328 (1880). Moreover, the defendant prior to trial has been able to confront every witness that will testify for him and knows what their testimony will be.

V

Petitioner Has Failed to Sustain His Contention That the Trial Court Applied T.C.A. § 40-2403 So as to Violate His Right to Testify in His Own Behalf or His Right to Be Heard Under Tennessee Constitution, Article I, Section 9; This Court Should Not Hold That the Tennessee Statute in Question Violates the Tennessee Constitution.

The Petitioner contends that Tennessee Code Annotated Section 40-2403 as applied in this case violated his rights under Tennessee Constitution, Article I, Section 9, providing in part, "That in all criminal prosecutions, the accused hath the right to be heard by himself and his counsel . . ."

To support this proposition, the Petitioner seems at one point of his brief (Pet.Br. 19) to rely on the Tennessee decision, **Wilson v. State**, 50 Tenn. 232 (1871), but then at a later point in his brief (Pet.Br. 21) he says that the **Wilson** interpretation of Article I, Section 9, "is no longer good law." Finally, it appears that the Petitioner really is relying upon a concurring opinion by a single judge in the **Wilson** case. There (Pet.Br. 22) he says that Judge Freeman in the aforesaid concurring opinion interpreted Article I, Section 9, of the Tennessee Constitution to mean "that he [the defendant] shall have the privilege of be-

ing defended in an argument before the jury, by counsel, in addition to the common law privilege of defending himself." 50 Tenn. at 247. The Petitioner quotes further from Judge Freeman's concurring opinion where the Judge stated, "that a prisoner may be heard in his own defense in all criminal prosecutions, and may also be heard by his counsel, means simply that such counsel shall make such argument in his defense, against the prosecution, as may be warranted by the law and the facts of the case; and that, being heard by himself, means precisely the same thing, no more, no less." 50 Tenn. at 246. If this concurring opinion by Judge Freeman in the Wilson case means anything more than that Article I, Section 9, guarantees both the defendant and his counsel the right to be heard in argument before the jury, it is beyond the Respondent's comprehension. Of course, that right is in no way involved in the instant case. The trial court below denied neither the Petitioner nor his counsel the right to defend the Petitioner by an argument before the jury. For that matter, the Petitioner was not barred in any respect during the trial from making an argument at any proper time to the judge or to the jury. The only thing that T.C.A. § 40-2403 as applied by the trial judge in this case prevented the Petitioner from doing was to testify in his own behalf after other witnesses for the defense had testified. And that did not deprive the Petitioner of his right under Tennessee Constitution, Article I, Section 9, "to be heard by himself and his counsel."

In fact, Petitioner in his brief. (Pet.Br. 24) candidly concedes that "Certainly Code § 40-2403 does not deny a defendant the right to be heard. . . ." The Petitioner's contention seems to be that Tennessee Constitution, Article I, Section 9, guarantees the defendant the right to be heard in testimony at some time later in his trial after he has decided not to testify at the beginning of his proof. Pet.

Br. 21). But the language of Article I, Section 9, of the Tennessee Constitution does not say that, and Respondent insists that it does not even imply that. In sum, the defendant **can** be heard by his own testimony, and he and/or his attorney may argue for the defendant at the close of the testimony for both sides, and nothing in T.C.A. § 40-2403 prevents any of this.

The Petitioner made this argument for a strained construction of Tennessee Constitution, Article I, Section 9, before the Court of Criminal Appeals of Tennessee and also before the Tennessee Supreme Court, but neither the intermediate nor the highest court of the State of Tennessee would buy his argument and construction. Having been turned down by the highest courts of the State of Tennessee on his proposed construction of the Tennessee Constitution as applied to the Tennessee statute, T.C.A. § 40-2403, the Petitioner now comes before the United States Supreme Court to try to get this Honorable Court to hold the Tennessee statute in question to be in conflict with the Tennessee Constitution. This Court has long adhered to the proposition that the ultimate determination of the validity of a state statute under the state's constitution rests with the highest court of that state. See *e.g.* **Highland Farms Dairy v. Agnew**, 300 U.S. 608, 612-613 (1937); **Glenn v. Field Packing Company**, 290 U.S. 177, 178 (1933); **Lehman v. State Board of Public Accountancy**, 263 U.S. 394, 397 (1923). More recently, the Court said in **McGautha v. California**, 402 U.S. 183, 91 S.Ct. 1454, 1474 (1971), that "the Federal Constitution . . . marks the limits of our authority in these cases," *i.e.*, cases challenging the trial procedures of the states.

CONCLUSION

For the foregoing reasons, Respondent, State of Tennessee, respectfully submits that T.C.A., § 40-2403 as applied in the trial of Petitioner's case below did not violate any rights of the Petitioner under the constitutional provisions which are properly before the Court under the Court's grant of certiorari limited to Questions III and IV presented by his petition and, that, therefore, the judgment of the Tennessee courts should be affirmed.

Respectfully submitted

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